SERVED: January 18, 2008

NTSB Order No. EA-5355

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of January, 2008

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, Complainant, v. SPENCER A. MURPHY and DENNIS S. VERNICK, Respondents.	)	Dockets SE-17587 and SE-17588

OPINION AND ORDER

The Administrator has appealed from the written initial decision and order of Administrative Law Judge William A. Pope, II, issued on November 22, 2006, following an evidentiary hearing held on November 14-15, 2006.[1] The law judge granted respondents' appeals and, although he found that the respondents committed most violations as alleged, reversed the

[1] A copy of the written initial decision is attached. Respondents' appeals were consolidated for hearing.

Administrator's orders of suspension, and dismissed the complaints. The Administrator had alleged that Respondent Murphy violated 14 C.F.R. §§ 91.13(a), 91.123(b), and 91.111(a); and that Respondent Vernick violated those sections in addition to §§ 91.123(a) and 91.183(c).[2] The Administrator proposed 60-day suspensions of Respondent Murphy's commercial pilot certificate and of Respondent Vernick's airline transport pilot certificate. We grant the Administrator's appeal.

Facts

We adopt the law judge's summary of evidence and factual findings of fact as our own. A recounting of pertinent facts, however, is in order. On April 17, 2005, Respondent Vernick was pilot-in-command and Respondent Murphy was second-in-command of a Lear 35 aircraft, number N89TC. After receiving an air traffic control (ATC) clearance to climb to 26,000 feet (Exh. A-2 (ATC transcript) at 4), they leveled off at 26,000 feet, and Respondent Murphy, who was at the controls, testified that he engaged the autopilot. When he checked the altitude indicator,

[2] Section 91.13(a) states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another. Section 91.111(a) states that no person may operate an aircraft so close to another aircraft as to create a collision hazard. Section 91.123(a) states that when a pilot obtains an ATC clearance, he may not deviate from that clearance, except in an emergency, unless an amended clearance is obtained or the deviation is in response to a traffic alert and collision avoidance system resolution advisory. Section 91.123(b) states that, except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised. Section 91.183(c) requires a pilot-in-command of an aircraft operated under IFR [instrument flight rules] in controlled airspace to maintain a continuous watch on the appropriate frequency and to report by radio as soon as possible any information relating to the safety of flight.

they were 120 feet above the assigned altitude. Respondent Vernick, performing pilot-not-flying duties, noticed the altitude-hold function was not on. N89TC had already arrested the ascent and started back down to 26,000 feet. Tr. at 341-42; see Exh. A-2 at 5-6.

In the meantime, a conflict alert activated on the air traffic controller's radar screen as to N89TC and a Canadair Bombardier CRJ2, FLG5700, meaning that data blocks on his radar screen started to flash in unison. The data blocks showed N89TC was at 26,300 feet, and FLG5700 was at its assigned altitude of 27,000 feet. The controller contacted respondents and asked them to verify they were at 26,000 feet. Respondent Vernick advised they were back at 26,000 feet. Exh. A-2 at 5-6. The controller testified that, because N89TC had already descended back to the assigned altitude, he took no other control actions. Tr. at 107. The parties stipulated this was a computer-detected altitude deviation. The separation criteria in the en route environment are 5 miles of lateral separation or 1,000 feet of vertical separation. At the time of the activation, the separation between the aircraft was 3.4 miles laterally and 700 feet vertically. A radar track analysis showed the aircraft were both generally proceeding to the southeast on converging courses.

FAA Order 2150.3A, Compliance and Enforcement Program, Compliance/Enforcement Bulletin No. 86-1 (86-1) (Exh. R-1), discusses computer-detected altitude deviations of 500 feet or less.[3] It states that:

[3] The Administrator does not dispute that 86-1 was in effect at

> ...a computer detected altitude deviation of 500 feet or less, where no near midair collision resulted, should normally be addressed by means of administrative action,[4] unless a prior altitude deviation occurred within 2 years of the date of the subject altitude deviation or other aggravating circumstances require initiation of legal enforcement action. In determining whether a violation is "aggravated," all circumstances surrounding the incident (e.g., whether the deviation was deliberate or inadvertent, the hazard to safety, etc.) shall be considered.

Hearing and Written Initial Decision

At the hearing, the Administrator presented the testimony of the controller, David Gish; the aviation safety inspector who investigated the incident, Robert Rogers; the quality assurance specialist who prepared the track analysis, Paula Peters; the operations manager, John Reider; and the controller's supervisor, Todd Moore. Mr. Rogers testified that the loss of standard separation between aircraft is an aggravating circumstance under 86-1 if the loss is 100 feet or more, and that the loss of separation here created a safety hazard because N89TC penetrated the separation bubble around FLG5700. He pointed out that the aircraft were on converging courses. Mr. Moore defined "collision hazard" as "aircraft operating ... with less-than-standard separation," but admitted that the term is not defined in FAA regulations. Tr. at 348-49.

Respondents presented the testimony of Jack Overman, a former FAA air traffic controller; Francis DeJoseth, a former FAA

(..continued)
the time of the flight at issue.

[4] An administrative action is understood to mean something other than a legal enforcement action, such as a warning notice, a letter of correction, or a remedial training program.

flight standards inspector; and the respondents, themselves. Respondents offered into evidence Advisory Circular 00-46C, Aviation Safety Reporting Program (ASRP), and verifications that timely ASRP reports were filed. Mr. Overman gave his opinion that the criteria in 86-1 were met, that the altitude deviation did not create a collision hazard, and that the Administrator should have issued a warning letter. Mr. DeJoseth testified that he would have resolved the case with a warning letter because he did not think there were any aggravating circumstances. He reached that conclusion because there was no urgency in the voice of the controller, who did not issue a turn to either aircraft. Tr. at 305.

The law judge found that Respondent Murphy violated the alleged FAR provisions, and that Respondent Vernick violated all but § 91.183(c). The law judge further found that there were no aggravating circumstances that would "make the Respondents ineligible under [86-1] for administrative action, rather than enforcement action." Written Initial Decision at 8. He also found "that the Respondents meet all of the criteria for application of the Administrator's policy of handling altitude deviations administratively," and that, "[b]y bringing this matter as an enforcement action, and not handling it administratively, the Administrator violated her policy set out in [86-1], and deprived the Respondents of the benefits[5] they were entitled to under that FAA policy," and he therefore

[5] That is, that such deviations would not be the subject of an enforcement action.

dismissed the complaints. Id. at 9-10.

Appeal

Because of our disposition of the appeal, we address only one of the Administrator's arguments. The Administrator argues that his exercise of prosecutorial discretion is not subject to Board review. Administrator's Appeal Br. at 18-22. He contends that the law judge substituted his judgment for that of the Administrator to elect one remedy over another; that it is the Administrator's prerogative to issue an order of suspension when the facts support one; and that the Board has no direct authority over his exercise of prosecutorial discretion. Id. at 18-19.

Respondents contest the arguments in the Administrator's appeal and urge the Board to affirm the law judge's decision. They argue that due process of law binds the Administrator to follow the policy adopted in 86-1. Respondents' Reply at 25-36.[6] Respondents contest the Administrator's argument that 86-1 applies only to computer-detected altitude violations discovered through the Air Traffic Quality Assurance Program. Id. at 36-38. Finally, respondents dispute the Administrator's argument that their altitude deviation involved aggravating circumstances. Id. at 39-40.

[6] Board Rule of Practice 49 C.F.R. § 821.48(b)(1) limits appeal briefs and reply briefs to "35 pages of text without prior leave of the General Counsel, upon a showing of good cause." (See § 821.48(c), regarding form requirements for reply briefs.) Violations of this rule may result in the rejection of a brief in excess of 35 pages, or in the consideration of only the first 35 pages of a brief that exceeds 35 pages. Here, respondent's 24-page statement of facts in a 41-page brief was excessive, taking up pages that could have been devoted to argument.

Discussion and Analysis

The Board will not review the Administrator's determination to pursue a matter through legal enforcement action. This is a matter of jurisdiction.[7] Jurisdiction "commences with the filing of a petition for review of an order of the Administrator and does not extend to an evaluation of the procedural steps leading to the issuance of that order."[8] The Board's charter prevents that.[9] The discretion to pursue one remedy over another or to pursue enforcement action at all is within the Administrator's purview.[10]

The law judge states that it is "well established that the Administrator is bound to follow her own regulations and policies." Written Initial Decision at 10, citing Steenholdt v. FAA, 314 F.3d 633 (D.C. Cir. 2003), and Lopez v. FAA, 318 F.3d

[7] See Administrator v. Moshea, NTSB Order No. EA-5328 at 5 (2007); see also Administrator v. Liotta, NTSB Order No. EA-5297 at 5 (2007); Administrator v. Nixon, NTSB Order No. EA-4249 at 9 (1994); Administrator v. Doll, 7 NTSB 1294, 1296-97 (1991); Administrator v. Cardozo, 7 NTSB 1186 (1991); Administrator v. Hunt, 5 NTSB 2314, 2316 (1987); Administrator v. Heidenberger, NTSB Order No. EA-3759 at 9-10 (1993).

[8] Hunt, supra at 2316.

[9] See 49 U.S.C. § 44709.

[10] In Administrator v. Montgomery, 3 NTSB 2150 (1980), the Board asserted its jurisdiction to review the Administrator's decision to impose a sanction when respondents filed reports under AC 00-46A, *Aviation Safety Reporting Program* (ASRP). Montgomery and its progeny, however, clarify the parameters of our jurisdiction. We have jurisdiction to review the imposition of sanction under the ASRP (now AC 00-46C) only because it "relates to the sanctions to be imposed." See 49 U.S.C. § 44709(d)(3); and Moshea, supra at 7. But the Board does not have jurisdiction to review the decision to bring an enforcement action. The decision to pursue an enforcement action does not "relate to the sanctions imposed."

242, 249 (D.C. Cir. 2003). Respondents also cite those cases. We have reviewed those cases and have determined that reliance on them, for analyzing the instant case, is misplaced. Although noting that agencies are required to follow their own rules, the D.C. Circuit, in Steenholdt, denied a petition for review of a decision of the FAA not to renew the authority to examine aircraft repairs for compliance with airworthiness regulations (not related to a certificate action appealable to this Board). The court held that the decision "is committed to agency discretion by law," and that the court *did not have jurisdiction* to review the substance of the FAA's decision. Steenholdt, 314 F.3d at 634, 640. The Lopez court also denied such a petition for review upon finding that it did not have jurisdiction.

Respondents and the law judge also cite two Board cases. In Administrator v. Randall, 3 NTSB 3624 (1981), the only evidence that supported the Administrator's alleged violations came from flight data recorder (FDR) tapes, which inspectors specifically reviewed for the sole purpose of pursuing enforcement action. The respondent objected to use of the tapes based on FAA policy, set forth in the Compliance and Enforcement Program manual (Order 2150.3). That policy stated, among other things, that, "...flight recorder tapes will not be utilized as a means to discover violations when the FAA has no other evidence of possible violations; and flight recorder tapes will not be used as evidence in an FAA enforcement action except for the purpose of corroborating other available evidence or to resolve conflicting evidence." Randall, supra at 3625. The Board would

not allow the Administrator to rely on the tapes as evidence in its enforcement action. Administrator v. Brasher, 5 NTSB 2116 (1987), as in the instant case, involved an altitude deviation, and resulted in what is now known as the "Brasher warning." The Board noted that FAA Notice N7210.251, "System Evaluation of Pilot Deviations as a Result of Operational Error Detection Alerts," instructed ATC to notify the pilot, with specific phraseology, when a possible deviation had occurred. Brasher, supra at 2116-17. The law judge there found that the Administrator proved FAR violations, but concluded no sanction should be imposed "because the FAA failed to comply with its own policy of notifying the pilot immediately when a deviation has occurred."[11] Id. at 2116. The Board denied the Administrator's appeal, finding that, "the law judge's application of Notice 7210.251 was consistent both with the circumstances of this case and with Board precedent...." Id. at 2119.

Randall and Brasher did not involve prosecutorial discretion at the point of the initiation of enforcement action. As the Board noted in Randall, "the conclusion that the FAA was not free to use a specific item of evidence has absolutely no bearing on the agency's right to prosecute the respondent for the alleged violations." Randall, supra at n.6. A similar rationale applies to the waiver of imposition of sanction in Brasher. Our review of Brasher and like cases establishes that a failure by ATC to

[11] Respondents raised the issue in this case, but the law judge found that ATC properly advised respondents of the altitude deviation, and that was what precipitated the filing of an ASRP report. See Written Initial Decision at 7.

provide a required notice of a deviation requires that sanction be waived for that violation, not that enforcement action for the violation be waived or dismissed.[12] The Board, in Randall and Brasher, did not address the Administrator's prosecutorial discretion to pursue an enforcement action. The Board addressed only the evidence that could be used to support the action and the sanction that could be imposed, respectively——the Board did not address the decision to bring the action.

We apply a similar principle today. The Board does not have jurisdiction to review the Administrator's discretion in choosing to bring an enforcement action against a respondent. We reject respondents' arguments that 86-1 precluded the Administrator from pursuing enforcement actions against respondents. In sum, the Board finds that the law judge's application of Bulletin No. 86-1 was not consistent with the Board's statutory charter or with Board precedent, and his decision in that regard is reversed.

Sanction

As to sanction, the Board finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's sanction, and we will apply a waiver of sanction, for the following reasons. The Administrator did not introduce the Sanction Guidance Table, FAA Order 2150.3A, Compliance and Enforcement Program, Appendix, into evidence at the hearing. It is the Administrator's burden under the FAA

[12] See, e.g., Administrator v. Pate and Yoder, NTSB Order No. EA-5105 at 5 (2004), citing Administrator v. McIntosh and Spriggs, NTSB Order No. EA-4174 at 12 (1994) (remedy for noncompliance with ATC notice requirement is to impose no sanction, not dismissal).

Civil Penalty Administrative Assessment Act[13] to articulate the sanction sought, and to ask that the Board defer to that determination, supporting the request with evidence showing that the sanction has not been selected arbitrarily, capriciously, or contrary to law.[14] It is "the Administrator's obligation explicitly and timely to raise the deference argument."[15] Next, we concur with the law judge's comments as to the circumstances surrounding respondents' violations that tend to make the offenses seem less serious: "In the instant case, while it is clear that while there was a loss of separation, there was no near mid-air collision, as defined in the Aeronautical Information Manual, Exhibit R-2, at 7-6-3(b)." Written Initial Decision at 9. That definition is, "an incident associated with the operation of an aircraft in which a possibility of collision occurs as a result of proximity less than 500 feet to another aircraft...." Id.; see Exh. R-2. The law judge noted that the

[13] 49 U.S.C. §§ 44709(d) and 46301(d).

[14] Administrator v. Peacon, NTSB Order No. EA-4607 at 10 (1997); see also Administrator v. Oliver, NTSB Order No. EA-4505 (1996) (Administrator introduced no evidence regarding applicable or relevant sanction guidance).

[15] See Administrator v. Kimsey, NTSB Order No. EA-4537 at 2 (1997). We note that the Administrator's counsel was not allowed to argue about sanction during closing argument. Failure to introduce the Sanction Guidance Table during the Administrator's case in chief means that the Board will not grant deference to the Administrator's choice of sanction. It does not mean that the Administrator is precluded from justifying the proposed sanction in argument by otherwise commenting on the evidence in the record. Preventing the Administrator's counsel from arguing about sanction was error on the part of the law judge. Based on other considerations discussed below, however, we resolve the sanction issue against the Administrator, and find that the law judge's error in precluding argument thereon was not reversible error in this case.

controller "did not feel it was necessary to divert either aircraft." Id. The law judge also noted that Mr. Rogers, "although characterizing the loss of separation as an aggravating circumstance, acknowledged that the collision hazard was slight, and there was a timely correction of the altitude deviation by [respondents]." Id.; see also Tr. at 204 (Mr. Rogers defined "slight" as "[o]ne in 100,000, one in a larger number, slight."). The law judge also noted that the altitude deviation resulted in a "fairly minor loss of separation," and that the risk to safety was "minimal." Id. Finally, filing a report under the ASRP concerning a FAR violation may preclude the imposition of a sanction when: (1) the violation was inadvertent and not deliberate; (2) it did not involve a criminal offense, accident, or action at 49 U.S.C. § 44709; (3) the person has not been found in an enforcement action to have committed a violation in the past 5 years; and (4) the person files a report within 10 days of the violation. Advisory Circular 00-46C at ¶ 9c. The parties stipulated that respondents filed timely reports under the ASRP. Tr. at 321. The Administrator does not dispute that the ASRP waiver of sanction applies here. Based on the particular circumstances of this case and these respondents, we will apply waiver of sanction.

Conclusion

The law judge found, with the exception of one regulatory violation, that the Administrator established all of the other allegations by a preponderance of the reliable, probative, and substantial evidence. The Board concludes that safety in air

commerce or air transportation and the public interest require affirmation of the law judge's findings as to the regulatory violations, and we therefore affirm his findings.[16]

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. The law judge's decision, finding violations of all but one of the Administrator's allegations, as noted in this opinion and order and in the law judge's decision and order, is affirmed;

3. The law judge's order, as to granting respondents' appeal, reversing the Administrator's orders of suspension, and dismissing the complaints, is reversed; and

4. The Administrator's orders of suspension are affirmed, but sanction is waived.[17]

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

[16] See supra p.5, ll.5-9.

[17] The Administrator moved to correct the transcript, indicating that a statement attributed to Administrator's counsel was incorrect. We note that the Administrator provided no evidence to show that the transcript was incorrect. The burden is on the moving party to establish that requested relief is required. Although our resolution of the case in the Administrator's favor moots the issue, for completeness of the record, respondents' motion to strike the Administrator's pleading is granted.

SERVED: November 22, 2006

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant

v. Docket Nos.: SE-17587
SE-17588

SPENCER ANDREW MURPHY, and
DENNIS SENCLAIR VERNICK,

Respondents.

WRITTEN INITIAL DECISION AND ORDER

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William A. Pope, II, Administrative Law Judge: This is a proceeding under the provisions of 49 U.S.C. §44709 (formerly Section 609 of the Federal Aviation Act) and the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board. Spencer Andrew Murphy and Dennis Senclair Vernick, the Respondents, have appealed the Administrator's Orders of Suspension, both dated November 2, 2005, as amended on December 30, 2005, which pursuant to §821.31(a) of the Board's Rules, serve as the complaints. The complaint against Respondent Murphy ordered the suspension of any commercial pilot certificates held by him, including Commercial Pilot Certificate, No 002850128, for 60 days, because he violated Sections 91.13(a), 91.123(b), and 91.111(a) of the Federal Aviation Regulations.[1] The complaint against Respondent Vernick ordered the suspension of

[1] The complaint against Respondent Murphy states:

any and all Airline Transport Pilot Certificates held by him, including Airline Transport Pilot Certificate No 002710634, for 60 days, because he allegedly violated Sections 91.13(a), 91.123(a), 91.123(b), 91.111(a), and 91.183(c), of the Federal Aviation Regulations.[2] The alleged violations resulted from a flight in a Lear 35, civil aircraft number N89TC, on or about April 17, 2005, during which Respondent Murphy was the second-in-command, and flying pilot, and Respondent Vernick was the pilot-in-command. The complaints allege that N89TC, operated by the Respondents, was cleared to climb to FL 260, but without an amended

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1. At all times material herein you were and are the holder of Commercial Pilot Certificate number 002850128.
2. On or about April 17, 2005, you, as second in command and Pilot Flying, operated civil aircraft N89TC, a Lear 35, on a flight under Instrument Flight Rules from the Clayton County Airport.
3. During the flight, N89TC was cleared to climb to FL260.
4. N89TC acknowledged the clearance.
5. Then, without another amended clearance, N89TC climbed through FL260 to approximately FL263.
6. Your climb above FL260 resulted in loss of IFR separation with FLG5700, and aircraft operating at FL270.
7. You operated N89TC close enough to FLG5700 as to create a collision hazard.
8. You failed to report N89TC's excursion above FL260 to ATC.
9. Your operation was careless or reckless, endangering the lives and property of others.

As a result, you violated the following sections of the Federal Aviation Regulations:

1. Section 91.13(a) by operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.
2. Section 91.123(b) by operating an aircraft contrary to an ATC instruction.
3. Section 91.111(a) by operating an aircraft close enough to another aircraft as to create a collision hazard.

[2] The complaint against Respondent Vernick states:

1. At all times material herein you were and are the holder of Airline Transport Pilot Certificate number 002710634.
2. On or about April 17, 2005, you, as pilot in command, operated civil aircraft N89TC, a Lear 35, on a flight under Instrument Flight Rules from Clayton County Airport.
3. During the Flight, N89TC was cleared to climb to FL260.
4. N89TC acknowledged the clearance.
5. Then, without another amended clearance, N89TC climbed through FL260 to approximately FL263.
6. Your climb above FL260 resulted in loss of IFR separation with FLG5700, and aircraft operating at FL270.
7. You operated N89TC close enough to FLG5700 as to create a collision hazard.
8. You failed to report N89TC's excursion above FL260 to ATC.
9. You asserted that at the time of the excursion, N89TC's auto pilot altitude hold function malfunctioned.
10. Your operation was careless or reckless, endangering the lives and property of others.

As a result, you violated the following sections of the Federal Aviation Regulations:

1. Section 91.13(a) by operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.
2. Section 91.123(a) by deviating from an ATC clearance.
3. Section 91.123(b) by operating an aircraft contrary to an ATC instruction.
4. Section 91.111(a) by operating an aircraft close enough to another as to create a collision hazard.
5. Section 91.183(c) in that the pilot in command of each aircraft operated under IFR in controlled airspace shall have a continuous watch maintained on the appropriate frequency and shall report by radio as soon as possible any other information relating to the safety of the flight.

clearance climbed through FL 260 to approximately FL 263,[3] resulting in loss of IFR separation and creation of a collision hazard, and that they failed to report N89TC's excursion above FL 260 to air traffic control.

In his Answer to the Complaint, Respondent Murphy admitted paragraphs 1 through 4 of the complaint against him, to wit: That he is the holder of Commercial Pilot Certificate No. 002850128; that on or about April 17, 2005, he operated N89TC, a Lear 35 aircraft, as second-in-command and flying pilot, on a flight under instrument flight rules from Clayton County Airport; that during the flight N89TC was cleared to climb to FL 260; and, that N89TC acknowledged the clearance. He denied paragraph 5, that he climbed through FL 260 to approximately FL 263, but he admitted so much of paragraph 6 as alleged a loss of IFR separation by an altitude deviation of 300 feet above the assigned altitude and that there remained 3.4 nautical miles lateral separation with an aircraft identified as FLG5700. He denied all other allegations of the complaint.

In his Answer, Respondent Vernick admitted paragraphs 1 through 4 of the complaint against him, to wit: That he is the holder of Airline Transport Pilot Certificate No. 002710634; that as pilot in command on April 17, 2005, he operated N89TC, a Lear 35, on a flight under instrument Flight Rules from Clayton County Airport; that during the flight N89TC was cleared to climb to FL260; and that N89TC acknowledged the clearance. He admitted so much of paragraph 6 as alleged a loss IFR separation by a climb above FL260, resulting in no less than 3.4 miles of lateral separation. He denied all other allegations of the complaint.

Both Respondents asserted five affirmative defenses in their answers: First, there were no aggravating circumstances, and FAA Compliance Bulletin 86/1 contained in FAA's Enforcement Compliance Manual, FAA Order 2850.3(a), required that the matter be resolved administratively by issuing a warning letter, not by pursuing enforcement action; second, their airman certificates cannot be taken from them without due process of law; third, the Administrator is bound by the policy in her Enforcement Handbook; fourth, the air traffic controller did not give Respondents a warning as required by FAA Order Number 7110.65(M), (May 19, 2000); and fifth, the Respondents are entitled to waiver of sanction by virtue of having filed a timely Aviation Safety Report with the National Aeronautics and Space Administration (NASA).

I. Summary of Evidence:

There is no dispute that the Respondents are the holders of the airman certificates alleged in the complaints; that on April 17, 2005, they operated N89TC, a Lear 35 aircraft, under instrument flight rules from Clayton County Airport, with Respondent Murphy as the second in command and the pilot flying, and Respondent Vernick as the captain-in-command; that they were cleared by ATC to climb to FL260 (26,000 feet) and that N89TC acknowledged the clearance; and that there was a loss of separation by N89TC climbing above FL260, resulting in no less than 3.4 nautical miles of lateral separation.

The Administrator and the Respondents stipulated that during the flight, there was an altitude deviation by N89TC of between 260 and 300 feet, and that the parameters of required IFR separation were 1,000 feet vertically and 5 miles laterally. The Administrator stipulated it was a computer-detected deviation.

[3] 26,000 and 26,300 feet, respectively.

It was further stipulated that both Respondents filed timely reports under the Aviation Safety Reporting Program.

David A. Gish, a retired FAA Air Traffic Controller, who on April 17, 2005, was manning Sector 22 at the Atlanta Air Traffic Control Center, testified that N89TC and Flagship5700 activated the conflict alert on his screen. He said it was a computer-detected deviation. The computer projects when aircraft are or soon will be violating separation rules, and flashes their data blocks on the radar screen indicating a loss of separation. He observed the flashing data blocks of N89TC and Flagship5700 within a second or two. There was no audible alarm.[4] N89TC was reporting an altitude of 26,300 feet in its data block, but he had only cleared it to 26,000 feet. Flagship5700 was at 27,000 feet, its assigned altitude. At that time N89TC was 700 feet under Flagship5700, and the lateral separation was around 3.4 nautical miles. He said that there could be a discrepancy between the altitude reported by a pilot and the altitude reported by his aircraft's mode C transponder.[5]

Controller Gish described N89TC and Flagship5700 as on slightly converging courses, but he did not call traffic to either aircraft or turn either aircraft. He said he was not worried about the two aircraft colliding, but if N89TC had continued to climb, they would have been fairly close.

By the time Gish called N89TC to ask its altitude about 9 seconds later, the aircraft was already descending, and quickly returned to FL260. He said he did not contact the pilot of N89TC and instruct him to contact Atlanta because of the deviation. He said that the aircraft was only on his frequency for 4 minutes.

The transcript of the radio communications between Gish and N89TC shows that at 1541:15 he cleared N89TC to FL260. At 1544:31 seconds, a little over 3 minutes later, he asked N89TC (referring to it as niner tango charlie), to verify flight level at two six zero. At 1544:36, N89TC replied, "yes sir uh we drifted up there a little bit sorry about that we're level two six zero now sir." At 1545:46, Gish instructed N89TC to climb and maintain FL 270, and N89TC acknowledged the instruction at 1546:05. At 1548:15, Controller Gish passed N898TC to Jacksonville Center.

Controller Gish said the purpose of the standard separation is to provide a buffer between aircraft.

Aviation Safety Inspector Robert R. Rogers, who has been with the FAA for 5 years, was an Army aviator in the Army Reserves for 32 years, and holds an ATP, airplane multi and single engine land ratings, helicopter ratings, and instructor rating. Using the aircraft identification number provided in the Atlanta Center's pilot deviation report, he identified the owner of the aircraft, and from the corporation that owned it, learned that the Respondents were the pilots at the time of the incident.

On Exhibit 5 (the pilot deviation report prepared by Atlanta Center), block 10(a) is checked, indicating a computer-detected deviation using the Error Deviation Program (EDP).

In block 16 of his Pilot Deviation Report, Exhibit A-6, Inspector Rogers made an entry that Respondent Vernick, the captain in command, told him that he had his head down.

[4] There is an audible alarm at the supervisor's station.
[5] There is no evidence of record corroborating that N89TC's transponder was reporting incorrect altitudes.

Exhibit A-10 is a record of a conversation Inspector Rogers had with Respondent Vernick on May 13, 2005. He made the record later that day, and acknowledged that is a summary of the substance of the conversation, not a verbatim account. Inspector Rogers said that Respondent Vernick told him that, "JAX center advised me to call Atlanta ARTC just before I switched over to Miami (They told me to phone the center when I reached my destination.)"

Exhibit A-11 are notes Inspector Rogers made of a conversation he had with Respondent Vernick on May 31, 2005. His notes reflect that Respondent Vernick said: "My SC, Murphy had this leg. My head was down when we went off alt. A/P malfunction on altitude hold. We went above by about 150 feet." He went on to say that he did not write up the autopilot, because it had done this once in awhile, but worked most of the time. Respondent Vernick told Inspector Rogers that he sent Inspector Rogers a copy of a NASA report that he filed.

Inspector Rogers said he did not interview Respondent Murphy, and Murphy did not respond to the LOI.

Inspector Rogers identified Exhibit R-1 as Compliance/Enforcement Bulletin No.86-1, which provides that computer-detected altitude deviations of 500 feet or less, where there is no near mid-air collision, should normally be addressed by administrative action, unless a prior altitude deviation occurred within the previous two years or other aggravating circumstances require initiation of legal enforcement action.

He said that in this instance the computer-detected deviation was less than 500 feet, there was no near mid-air collision, and the Respondents did not have prior altitude deviations within the preceding 2 years, but he said there were aggravating circumstances which disqualified the Respondents from having their altitude deviation addressed by administrative action. He said the aggravating circumstance was a collision hazard from loss of separation. He acknowledged that the collision hazard was slight, and the deviation was an anomaly. He also agreed that there was a timely correction of the altitude deviation.

Inspector Rogers said that every loss of separation might not be an aggravating circumstance, because that depends on whether there were safety factors involved. Here he said the altitude deviation by the Respondents was probably inadvertent, but it was hazardous to safety, because N89TC caused a loss of separation, and penetrated the other aircraft's bubble of safety. He said converging aircraft is one thing, diverging is another. Here the aircraft were converging, but never got closer than 3.4 nautical miles from each other. He agreed that if N89TC remained 700 feet below the Flagship 5700, the two aircraft would not converge.

The Administrator called Paula C. Peter. She is an FAA Quality Assurance Specialist. She identified Exhibit A-7 as NTAP data, which shows that the two aircraft were on converging southeast courses. The time covered is from 1544:10 to 1545:34. During that time there were 8 radar hits on N89TC spaced 12 seconds apart. The altitude of N89TC is shown at 26,200 feet, 26,300 feet, 26,200 feet, 26,000 feet on the next 3 hits, and 26,100 feet on the last two hits.

The Respondent called two witnesses and testified in their own behalf.

The Respondents' first witness was Jack Overman, a retired FAA Air Traffic Control Specialist, with 31 years experience, including 20 years as a supervisor. He retired in 2006. He

was accepted as an expert in air traffic control procedures. He testified that in his opinion there were no aggravating circumstances.

During his testimony, the Administrator stipulated that Atlanta Center did not give a pilot deviation notification to the Respondents, using the phraseology "Possible Pilot Deviation Advise You Contact (facility) at (telephone number)."

Mr. Overman said that in his opinion, the controller had time to give the warning using the language in the order.

He said that in his opinion, based on the NTAP data, and the transcript of communications, the Mode C transponder in the Respondents' aircraft was reporting its altitude as 100 to 200 feet too high.

Francis N. DeJoseph is an aviation consultant, who retired from the FAA as an air traffic control manager. He stated he would have resolved this matter with a warning letter, because there were no aggravating circumstances, and the Respondents were entitled to relief under Enforcement Bulletin 86-1. He said the controller did not sound urgent, and did not direct N89TC to turn.

Respondent Vernick testified in his own behalf. He said he was the pilot-in-command of the flight on April 17, 2006, in N89TC, owned by Smith Air, a Lear 35 jet, from the Atlanta area, to the Bahamas to pick up passengers. His second-in-command, and the pilot flying, was Respondent Murphy. Atlanta Center instructed them to climb from FL230 to FL260. He was not aware of their altitude while they climbed, because he was busy with other duties. He said he saw Respondent Murphy engage the autopilot and press the altitude hold button when they reached FL260 and level flight was established. Sometime after that Respondent Murphy said the aircraft was off its altitude, and asked what was going on. Respondent Vernick said he noticed that the indicator light in the altitude hold button was not on. By then Respondent Murphy had arrested the climb, and had re-established FL260. Once level flight was established, he saw Respondent Murphy press the altitude hold button, and it lighted. They had already leveled off at FL260 when ATC called. He said the highest altitude he observed was 26,080 feet. He said the altitude alert did not go off. He said the controller never turned them, and he was unaware of any other aircraft in the vicinity.

Respondent Vernick said that Jacksonville Center gave him a telephone number he should call when they landed. He said he called the number, and believes that he was connected to Atlanta Center. He said he was told there had been an altitude deviation and they were filing a report.

Said he filed a timely NASA report, and the Administrator stipulated that it was timely under the Aviation Safety Reporting Program.

He said he talked to Aviation Safety Inspector Rogers at Smith Air. He said he told Inspector Rogers he was aware he was being investigated for an altitude deviation, and had filed a NASA report. He said Inspector Rogers told him not to worry about it.

Respondent Spencer Andrew Murphy said that he was the pilot flying, and that he had less than 100 hours in the Lear 35 jet when this incident occurred. He holds a Commercial Pilot Certificate, single and multi-engine land. He said they were going from Atlanta to the Bahamas to get passengers. He said they were cleared to FL260, and when they reached that altitude, and leveled off, he engaged the autopilot. He said that within seconds, he noticed that their

altitude was 20 feet high, and asked Respondent Vernick why. Respondent Vernick told him the altitude hold button was not in. As he was bringing N89TC down, Air Traffic Control asked their altitude, and Respondent Vernick answered there had been a glitch. He said that the maximum altitude N89TC reached was 26,280 feet. He did not see another aircraft.

He said that when he returned to their base, he reported the problem with the autopilot to the chief pilot, but did not think he had to log it.

In rebuttal the Administrator called Ted Moore, a supervisor air traffic controller, who had supervised Air Traffic Controller Gish in Area 4. He said there is a collision hazard when aircraft operate with less than standard separation. He said that definition is not in the Federal Aviation Regulations.

II. Discussion and Findings

I find from the evidence of record that Respondents operated a Lear 35 jet aircraft, civil aircraft number N89TC, owned by Smith Air, on or about April 17, 2005, on a flight under Instrument Flight Rules, during which Respondent Murphy was the second-in-command, and pilot flying, and Respondent Vernick was the pilot-in-command. N89TC was cleared by Air Traffic Control to climb to FL 260. The transcript of communications between Atlanta Center and N89TC indicates that N89TC acknowledged the clearance from ATC. Without an amended clearance, N89TC climbed above FL 260 by approximately 260 to 300 feet, resulting in loss of IFR separation with another aircraft. The required IFR separation at that point was 1000 feet vertically and 5 miles laterally. At FL263, its highest altitude, N89TC was approximately 700 feet below the other aircraft vertically, and 3.4 miles from it laterally. The transcript of communications reflects that at 1541:15 David Gish, the Air Traffic Controller, cleared N89TC to FL260. At 1544:31 seconds, a little over 3 minutes later, the controller asked N89TC (referring to it as niner tango Charlie), to verify FL260. The NTAP data shows that at 1544:10, the altitude of N89TC was 26,200 feet; at 1544:22 its altitude was FL263; at 1544:34, its altitude was FL262; and, at 1544:46 its altitude was FL260. At the time ATC requested N89TC to verify its altitude, it was descending from FL263, its altitude at 1544:22. At 1544:36, N89TC replied, “yes sir uh we drifted up there a little bit sorry about that we’re level two six zero now sir.” At 1545:46, Gish instructed N89TC to climb and maintain FL 270. N89TC acknowledged the instruction at 1546:05. At 1548:15, Gish passed N898TC to Jacksonville Center. There are no further communications between ATC and N89TC in the transcript, which ends at 1554:39.

Although the Respondents attributed the altitude deviation from FL260 to a possible malfunction in the autopilot, or perhaps a failure of the altitude hold button to remain depressed, they offered nothing to corroborate that there was a problem with the autopilot. In the absence of any corroborating evidence of an autopilot malfunction, I find that the altitude deviation was due to pilot error or inattention, and not to an equipment malfunction.

The evidence does not support the Respondents’ defense that ATC failed to advise them that an altitude deviation had occurred, and failed to instruct them to contact Atlanta Center. Respondent Vernick testified that Jacksonville Center notified him to call Atlanta Center when he landed, and, that he did place a telephone call to Atlanta Center as instructed and was advised of the altitude deviation. In any event, both Respondents filed timely reports under the Aviation Safety Reporting Program, so regardless of whether or not the notice was in an approved format, there was no prejudice.

The evidence also does not support a finding that Respondent Vernick violated FAR Section 91.183(c) by failing to report the altitude deviation to ATC. ATC was aware of the altitude deviation as it occurred, and contacted N89TC, asking it to verify FL260.

With those exceptions, I find that the Administrator has proven each of the violations alleged in the complaints against the Respondents by a preponderance of the evidence.[6] Thus, I find that Respondent Murphy violated FAR Sections 91.13(a), 91.123(b), and 91.111(a). I further find that Respondent Vernick violated FAR Sections 91.13(a), 91.123(a), 91.123(b), and 91.111(a).

The next issue is whether or not the Respondents are entitled to benefit from FAA Compliance/Enforcement Bulletin 86.1, contained in the FAA Enforcement Compliance Manual, FAA Order 2850.3(a). FAA Compliance/Enforcement Bulletin No.86-1 sets out four criteria for determining if an airman is entitled to administrative handling of an altitude deviation in lieu of enforcement action: (1) The deviation must have been computer detected; (2) the deviation must have been 500 feet or less; (3) the airman must not have had a prior altitude deviation within two years of the date of the subject altitude deviation; and, (4) there must have been no aggravating circumstances.[7]

The Administrator contends that the Respondents do not qualify for resolution of the charges against them by administrative action rather than enforcement action, because there were aggravating circumstances that require initiating legal enforcement action. The provisions of FAA Compliance Enforcement Bulletin 86.1, requiring that an incident be handled by administrative action, do not apply if there were aggravating circumstances.

The evidence of record clearly establishes that the Respondents deviated from FL260, the altitude to which Air Traffic Control cleared N89TC, without obtaining an amended clearance, by climbing 260 to 300 feet above FL260. It is undisputed that the altitude deviation was computer detected, that it was less than 500 feet, and that because of the altitude deviation by N89TC, there was a loss of separation with another aircraft. N89TC came within approximately 700 feet vertically and 3.4 miles laterally of another aircraft flying atFL270.

The remaining question is whether or not there were aggravating circumstances, such that make the Respondents ineligible under FAA Compliance Enforcement Bulletin 86.1 for administrative action, rather than enforcement action.

The controlling case is *Administrator v. McColl,* NTSB Order EA-4315 (1995). In that case, the respondent twice exceeded his clearance of 3000 feet, the highest being to 3,400 feet. There was a helicopter at 4,000 feet. At the closest point the two aircraft came within 600 feet of each other's altitude and were approximately 2 ½ miles apart, laterally. The respondent

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[6] Both Respondents were charged with violating FAR Section 91.111(a) by operating aircraft close enough to another as to create a collision. Although N89TC did not come close enough to the other aircraft to constitute an actual near collision, its excursion above FL260 constituted a potential collision hazard, if it had continued unchecked.

[7] FAA Compliance/Enforcement Bulletin No.86-1 provides that:

> Until further notice, a computer-detected altitude deviation of 500 feet or less, where no near mid-air collision resulted, should normally be addressed by means of administrative action, unless a prior altitude deviation occurred within 2 years of the date of the subject altitude deviation or other aggravating circumstances require initiation of legal enforcement action. In determining whether a violation is aggravated, all circumstances surrounding the incident, e.g. whether the deviation was deliberate or inadvertent, the hazard to safety, etc., shall be considered.

argued that Administrator acted contrary to his own policy and should not have brought the action to suspend his certificate for 30 days. The Board found no inconsistency between the Administrator's action and his written policy. The Board said the respondent should have had heightened awareness of his altitude after the first loss of separation from the helicopter, and found the record supported a finding that his second deviation reflected a marked lack of awareness and attention at best, and this failure qualified as aggravating circumstances. The Board said that it also agreed that, despite the fact the aircraft were moving away from each other rather than converging and the testimony of the Administrator's witnesses that they saw no real danger, loss of separation could constitute an aggravated circumstance due to the inherent safety risk in high-speed aircraft traveling so close to each other.

This case, in contrast, involves a single incident of altitude deviation of between 260 and 300 feet, which was detected and corrected by the Respondents. On these facts, therefore, this case is distinguishable from the situation in *McColl*, a case in which there were two closely spaced altitude deviations, such that the Board found the respondents were guilty of a marked lack of awareness and attention.

In the instant case, while it is clear that while there was a loss of separation, there was no near mid-air collision, as defined in the Aeronautical Information Manual, Exhibit R-2, at 7-6-3(b), which defines a near mid-air collision as follows: "A near midair collision is defined as an incident associated with the operation of an aircraft in which a possibility of collision occurs as a result of proximity less than 500 feet to another aircraft, or a report is received from a pilot or a flight crew member stating that a collision hazard existed between two or more aircraft."

I find that while there was a potential for a mid-air collision, if N89TC had continued to climb unchecked, it did not do so, and there was never an actual risk of a mid-air collision. The closest N89TC came to the other aircraft (Flagship5700) was 700 feet vertically and 3.4 miles laterally. At the time Air Traffic Control contacted N89TC to ask its altitude, the Respondents had already noticed the altitude deviation and they were in the process of returning to FL260. Controller Gish testified that he was not worried that the two aircraft would collide, and said that even if N89TC had continued to climb, it would have come close to the other aircraft, but would not have collided with it. Gish did not feel it was necessary to divert either aircraft. Aviation Safety Inspector Rogers, although characterizing the loss of separation as an aggravating circumstance, acknowledged that the collision hazard was slight, and there was a timely correction of the altitude deviation by N89TC.

While the Board said in *Administrator v. McColl, supra,* that a loss of separation may constitute an aggravated circumstance, because of the inherent risk in high-speed aircraft traveling so close together, the Board did not go so far as to say that every loss of separation would be an aggravating circumstance. Here, I find that the altitude deviation was inadvertent, and that the actual, as opposed to potential, risk to safety was minimal. I do not find the loss of separation in this case, standing alone, to be an aggravated circumstance. Even two of the Administrator's witnesses considered the collision hazard to be slight. The extent of the altitude deviation was appreciable, but it did not exceed 500 feet, which is one of the criteria in FAA Compliance/Enforcement Bulletin No.86-1, and it was detected by the Respondents and arrested before it placed the other aircraft in actual jeopardy.

On this record, I find that the circumstances surrounding the altitude deviation committed by the Respondents, resulting in a fairly minor loss of separation, were not aggravated. Therefore, I further find that the Respondents meet all of the criteria for application of the Administrator's policy of handling altitude deviations administratively, as set out in FAA Compliance/Enforcement Bulletin No.86-1.

It is well established that the Administrator is bound to follow her own regulations and policies. *Steenholdt v. FAA,* 317 F.3d 633 (D.C. Cir. 2003); *Lopez v. FAA*, 318 F.3d 242, 249 (D.C. Cir. 2003); *Vitarelli v. Seaton,* 359 U.S. 535 (1959); *Administrator v. Randall,* 3 NTSB 3624 (1981); *Administrator v. Brasher,* 5 NTSB 2116 (1987).

By bringing this matter as an enforcement action, and not handling it administratively, the Administrator violated her policy set out in FAA Compliance/Enforcement Bulletin No.86-1, and deprived the Respondents of the benefits they were entitled to under that FAA policy. Therefore, the complaints against the Respondent must be dismissed.

Accordingly, it is ORDERED that:

1. Respondents' appeals are GRANTED.

2. The Administrator's Orders of Suspension are reversed.

3. The Complaints are dismissed.

ORDERED this 22nd day of November 2006 at Washington, D.C.

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WILLIAM A. POPE, II
Judge

APPEAL (WRITTEN INITIAL DECISION)

Any party to this proceeding may appeal this written initial decision by filing a written notice of appeal within 10 days after the date on which it was served. An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 4704
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this initial decision. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. sections 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.